

CRIMES AMENDMENT (COGNITIVE IMPAIRMENT—SEXUAL OFFENCES) BILL 2008

Page: 9425

Bill introduced, read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Justice, and Acting Minister for Education and Training) [2.33 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Amendment (Cognitive Impairment—Sexual Offences) Bill 2008. Article 3 of the United Nations Declaration on the Rights of Disabled Persons states:

Disabled persons have the inherent right to respect for their human dignity.

Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age which implies first and foremost the right to enjoy a decent life, as normal and as full as possible.

It is therefore important that any reforms in the area of sexual assault as it relates to people with a cognitive impairment should be based on the principle that individual autonomy should be respected to the highest possible degree. It is accepted that the law should not deny people with a cognitive impairment the freedom to participate in consensual sexual relationships. However, the law must also serve to protect vulnerable members of society from sexual exploitation. This bill is another step in the Government's ongoing legal reforms in the area of sexual assault arising out of the recommendations of the Criminal Justice Sexual Offences Taskforce and, in particular, a continuation of the recent reforms that provide greater protections for cognitively impaired people in the criminal justice system.

A number of government and non-government organisations were represented on the task force, including the Attorney General's Department, the Director of Public Prosecutions, the Office for Women, judicial officers from the Supreme Court, District Court and Local Court, as well as the Judicial Commission, the New South Wales Women's Legal Service, the Crown Advocate, senior academics, the Law Society, the Department of Community Services, Victims Services, the Violence Against Women Specialist Unit, the New South Wales Police Force, the Legal Aid Commission, the Public Defender's Office, the New South Wales Bar Association, the New South Wales Department of Health and the New South Wales Rape Crisis Centre. The task force report contained 70 recommendations, which not only focused on the law and procedures affecting the prosecution of sexual assault matters but also gave rise to more general concerns in respect of the protection of vulnerable witnesses within the criminal justice system.

The task force recognised that people who have an intellectual disability or other cognitive impairment can be more vulnerable to sexual assault, particularly when they require assistance with their daily life activities. This was the rationale that was reflected in the original introduction of section 66F of the Crimes Act 1900, which criminalises sexual intercourse with intellectually disabled persons when the offender is the carer of the impaired person or is taking advantage of the person's impairment. The task force report highlighted the need to increase the protection that is provided to people with intellectual disabilities and other cognitive impairments, as such people are more vulnerable to sexual assault and abuse due to the nature of their impairment and because they depend on others for assistance with daily life. Other factors that are likely to increase vulnerability to criminal victimisation are their impaired judgement, deficits in adaptive behaviour, accompanying physical disabilities which may inhibit the person conveying sexual victimisation, the high-risk environments in which they live and work, their lack of knowledge about their rights, and the attraction of some abusers to environments in which they will encounter vulnerable victims.

Of all the crimes recorded against intellectually disabled people, the most frequent crimes are sexual and physical assault. Most sexual assaults of intellectually disabled people occur in the victim's place of residence, and in many cases the abuser is someone known to the victim. A discussion paper on this issue and draft consultation bill were published and circulated in June 2007 by the Criminal Law Review Division of my department. Several submissions were received from a wide range of community organisations and authorities, including the Intellectual Disability Rights Service, the Office of the Public Guardian, the Department of Ageing, Disability and Home Care, the Victims Advisory Board, the New South Wales Police Force, the Legal Aid

Commission, the Office of the Director of Public Prosecutions and a number of magistrates and judges. The extensive consultation was of great assistance to the policy and drafting process.

At present the Crimes Act 1900 sets out sexual offences in divisions 10 and 10A of part 3. Section 66F provides for specific sexual assault offences against victims with an intellectual disability. Consent is not a defence to these offences, as they are designed to capture people taking advantage of the victim's intellectual disability and inherent vulnerability to sexual exploitation. The offences are also designed to capture carers who take advantage of their charge's disability and vulnerability to sexual exploitation. To enliven the application of the current section 66F, the victim must have an intellectual disability defined only as "an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with their daily life activities".

Serious intellectual disability is also an aggravating feature that increases the maximum penalty of a number of sexual assault offences in the Crimes Act 1900, such as, sexual assault, indecent assault and sexual servitude. "Serious intellectual disability" is not defined and the concept of "serious" is left open to interpretation. The task force recommended that all these occurrences of the term "intellectual disability" in divisions 10 and 10A of part 3 of the Crimes Act 1900 be replaced with an updated term and definition that will reflect a more contemporary understanding of the nature of such disabilities and impairments. This was supported by the submissions received in response to the discussion paper and draft consultation bill. A new definition would also provide greater protection to people with a cognitive impairment by addressing the gap between the existing definition and a wide range of people who are vulnerable to such exploitation but are not currently captured by the existing narrow definition of intellectual disability.

The amendments in the bill seek to clarify and extend the nature of sexual offences committed against persons who have a cognitive impairment. The bill replaces the term "intellectual disability" with the term "cognitive impairment" and provides for an updated definition. A person has a cognitive impairment if a person has:

- (a) an intellectual disability; or
- (b) a developmental disorder (including autistic spectrum disorder); or
- (c) a neurological disorder; or
- (d) dementia; or
- (e) a severe mental illness; or
- (f) a brain injury,

that results in the person requiring supervision or social habilitation in connection with their daily life activities.

The extensive consultation conducted by the Criminal Law Review Division was of great assistance in formulating an appropriate definition. It was generally submitted that cognitive impairment was a preferable catch-all term, with intellectual disability as a category therein. The new definition covers all impairments of cognitive capacity, whether a disability, disorder, illness or injury. The additional threshold of supervision or social habilitation in connection with daily life activities, which has been retained from the original section 66F, excludes minor impairments. Further, it was agreed that this new definition should replace the term "serious intellectual disability" as an aggravating feature of the other sexual assault offences, because the requirement for supervision or social habilitation in connection with daily life activities makes the level of impairment sufficiently serious to meet the requirements of those sections.

The bill also seeks to reform section 66F, which sets out the offence of sexual intercourse with a cognitively impaired person. Currently section 66F only covers the offence of sexual intercourse, but does not refer to indecent assaults or acts of indecency. The taskforce report recommended that this omission be rectified, and this was supported in the consultation process. In order to achieve this, it was decided to insert an additional subsection which states that consent is not a factor in the existing indecent assault offences and acts of indecency when committed against cognitively impaired victims, where it can be established that the person was responsible for the care of that person, whether generally or at the time of the offence, or where the accused engaged in the conduct constituting the offence with the intention of taking advantage of the person's cognitive impairment. The penalties also fall in line with the existing indecency offences.

The task force report, and submissions received, also recommended that the concept of carer in section 66F be extended to include home-based and volunteer carers beyond the current definition, and that only refers to being under the authority of the person in connection with any facility or program providing services to persons with intellectual disabilities. The bill achieves the effect of this recommendation by replacing the existing definition with the broader concept of "person responsible for care". A person is responsible for the care of a person with a cognitive impairment if the person provides care to that person at a facility at which persons with a cognitive impairment are detained, reside or attend, or at the home of that person in the course of a program under which

any such facility or other government or community organisation provides care to persons with a cognitive impairment.

The care of a person with a cognitive impairment includes voluntary care, health professional care, education, home care and supervision. This new definition will capture those that provide care or supervision outside of a formal institutional setting, and those who are not paid for the services they provide to cognitively impaired persons. It is important to note that the fact that the care or supervision takes place in a facility or at home does not mean that the offence must also take place in that particular setting. An accused person will be considered a person responsible for care if they provide that care or supervision in a facility or at home, even if the offence is committed outside either of those settings—for example, in an outdoor setting, another location, or in a vehicle. The new provision also makes it clear that the care in question includes not only care provided by health professionals, but also unpaid care, as well as education services, home care services, and general supervision.

A particular concern of the task force—and this appeared in submissions received in response to the discussion paper—was that there were adequate defences available for persons in a genuine relationship with a cognitively impaired person, and also a defence for a person such as a carer conducting medical or hygienic procedures. This bill therefore amends section 66F to insert a specific defence for accused persons who are married to, or in a de facto relationship with, the cognitively impaired person. It also includes a specific defence for procedures done by carers that are for medical and hygienic purposes.

Finally, the bill also amends the Criminal Procedure Act 1986 to insert the new definition of "cognitive impairment". The Government introduced a number of reforms in early 2007 to assist vulnerable witnesses in giving their evidence in the criminal justice system. These amendments required a new definition of "intellectual impairment". However, the extensive consultation process conducted by the Criminal Law Review Division in respect of the current amendments had not yet been completed. In order to have these beneficial vulnerable witness provisions available to all those in need at the earliest opportunity, it was agreed that those amendments would progress, with a view to clarifying the definition of "intellectual impairment" after the consultation process, in conjunction with this current bill.

Therefore, the existing definition of "intellectual impairment" in the vulnerable witnesses provisions of the Criminal Procedure Act 1986 will be replaced by the more appropriate term and definition "cognitive impairment". A "cognitive impairment" includes any of the following: an intellectual disability; a developmental disorder, including an autistic spectrum disorder; a neurological disorder; dementia; a severe mental illness; or a brain injury. The additional threshold of requiring supervision or social habilitation in connection with daily life activities does not apply here. This is because these provisions are beneficial in nature and seek to provide support to vulnerable witnesses in giving their evidence, rather than grounding the basis for an investigation and prosecution on the basis that the victim had a serious impairment.

I now turn to the detail of the bill. Schedule 1 amends the Crimes Act 1900. Item [1] of schedule 1 amends section 61H of the Crimes Act 1900 by replacing the term "intellectual disability" with "cognitive impairment" and an extended definition. A person has a cognitive impairment if the person has an intellectual disability, a developmental disorder—including an autistic spectrum disorder—a neurological disorder, dementia, a severe mental illness, or a brain injury that results in the person requiring supervision or social habilitation in connection with daily life activities.

Item [2] of schedule 1 replaces the term "serious intellectual disability" with the term "cognitive impairment" as an aggravating feature that raises the maximum penalty for a number of sexual offences in the Crimes Act 1900. These are section 61J—aggravated sexual assault; section 61M—aggravated indecent assault; section 61O—aggravated act of indecency; section 66C—sexual assault of a child between 10 and 16; and section 80A—sexual assault by forced self-manipulation.

Item [3] of schedule 1 amends the alternative verdict provisions in section 61Q regarding the question of consent and cognitive impairment. Essentially, this provision enables a jury in a trial for an offence of non-consensual sexual intercourse with a cognitively impaired person under sections 61J or 61JA to bring an alternative verdict under section 66F of sexual intercourse with intent to take advantage of the person's cognitive impairment, in cases where the jury is not satisfied that there was no consent.

Item [4] of schedule 1 replaces the old section 66F with a new provision that reflects the new definition of "cognitive impairment" in section 61H. The offences and penalties effectively remain the same as the old provision; however, they are set out slightly differently. The maximum penalty for sexual intercourse with a cognitively impaired person, where the offender is taking advantage of the victim's cognitive impairment, is eight years. This penalty increases to 10 years where the offender is the person responsible for the care of the cognitively impaired person. As before, consent is not an element of these offences, therefore the penalties are much lower than those available for non-consensual sexual intercourse with a cognitively impaired person under section 61J, which is 20 years.

The new subsection (1) outlines the meaning of "person responsible for care" as it relates to sexual offences of cognitively impaired people. For the purposes of the new section 66F, a person is responsible for the care of a

person who has a cognitive impairment if the person provides care to that person at a facility at which persons with a cognitive impairment are detained, reside or attend, or at the home of that person in the course of a program under which any such facility or other government or community organisation provides care to persons with a cognitive impairment.

It must be pointed out that this section does not confine the offence to taking place either at a facility or in the home. This section clarifies the class of people captured by the provisions, rather than the location of the offence. As long as the accused falls within the definition of a person responsible for care of a cognitively impaired person, it does not matter whether the offence was committed in the facility or home, or in another location such as an outdoor setting, another home or venue, or a vehicle. The section also clarifies that the care of a person with a cognitive impairment includes not only care provided by health professionals, but also unpaid care, as well as education services, home care services, and general supervision.

The new subsection (5) of section 66F extends the existing regime by making it an offence to commit an indecent assault or act of indecency with a cognitively impaired person. It states that consent will be no defence to a charge of indecent assault or act of indecency where the accused was responsible for the care of that person, whether generally or at the time of the offence, or the accused engaged in conduct constituting the offence with the intention of taking advantage of that person's cognitive impairment.

The range of penalties will now be seven years for the indecent assault of a cognitively impaired person, as opposed to five years for the indecent assault of a non-impaired person; five years for an act of indecency towards a cognitively impaired child under 16, as opposed to two years for an act of indecency towards a non-impaired child under 16; and three years for an act of indecency towards a cognitively impaired adult, as opposed to 18 months for a non-impaired adult.

Proposed new subsection (6) sets out defences for persons who are married or in a de facto relationship with the cognitively impaired person, or persons who perform acts for medical or hygienic purposes. The current defence for an accused who was not aware the other person was cognitively impaired is retained. Item [5] of schedule 1 amends section 80C—sexual servitude—by replacing the term "serious intellectual disability" with the phrase "cognitive impairment" within the meaning in division 10. This imports the new definition inserted into the sexual assault offences in division 10 of part 3 of the Crimes Act 1900, into the sexual servitude offences contained in division 10A. The effect of this amendment is identical to those made by items [1] and [2].

Item [6] of schedule 1 contains savings and transitional provision for the Crimes Act 1900. Schedule 2 sets out amendments to the Criminal Procedure Act 1986. Items [1] to [6], [8] to [10] and [12] replace the term "intellectually impaired persons" with the term "cognitively impaired persons" in the following provisions: section 76—recordings of interviews with vulnerable persons; section 91—witnesses may be directed to attend; section 185—recordings of interviews with vulnerable persons; section 306M(1)—definitions; section 306P—application of part; section 306R—evidence to which this division applies; and Section 306ZK—vulnerable persons have a right to the presence of a supportive person when giving evidence.

Item [7] replaces section 306M(2)—Definitions—by inserting the new definition of "cognitive impairment". A cognitive impairment includes any of the following: an intellectual disability; a developmental disorder, including an autistic spectrum disorder; a neurological disorder; dementia; a severe mental illness; or a brain injury. Item [11] similarly amends section 306T—wishes of vulnerable person to be taken into account—by replacing subsection (1)(b) with references to cognitive impairment, rather than intellectual impairment. I commend the bill to the House.